

# Copyright Committee Working Meeting

16 July 2019

# Agenda

1. National updates
2. Copyright at WIPO – overview and update
3. EU Digital Single Market – overview and update

# National updates

USA

New Zealand

UK

# WIPO – Overview and update



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# WIPO

- **191 Members, UN Body**
- **Focus on copyright, patents, trademarks, design rights, geographical indications, and traditional knowledge and cultural expression.**
- **Ability to negotiate Treaties, such as Marrakesh**
- **Extensive training programme**



# SCCR

## Crews Studies

### Eleven themes:

- Preservation
- Reproduction
- Lending
- Legal Deposit
- Parallel Importation
- Cross-Border Access
- Orphan and Out of Commerce Works
- Limitations on Liability
- Contract Override
- Technological Protection Measures
- Translation

**But what objective?**



# Developments in the last year

- A year ago action plans were agreed in relation to exceptions and limitations, including:
  - Three regional seminars to analyze the situation in the region and explore areas for action
  - An international conference to consider the opportunities and challenges provided by various international solutions as appropriate
  - The development of a classification to better visualize and understand existing exceptions and limitations
  - A brainstorming exercise with professionals and relevant stakeholders

# Geneva 1-5 April 2019

- Typologies were presented by expert authors seeking to provide an overview of how existing statutes define relevant exceptions and limitations in order to allow for comparisons.
  - Libraries
  - Museums
  - Archives
  - Educational and Research activities
- Useful in providing a checklist of questions that governments could seek to address when drafting laws
- All available here:  
[https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=50418](https://www.wipo.int/meetings/en/details.jsp?meeting_id=50418)



# Libraries typology – Prof. Kenneth Crews

- To identify many of the leading topics and library services that are addressed in statutes of the Member States
- To articulate the fundamental rights of the copyright owner affected by the individual copyright exceptions
- To isolate the nuances and specific differences among the statutes and therefore the possibilities for drafting statutes or international instruments
- To set forth major issues that remain unclear or generally unresolved and that may be the subject of future analysis or negotiation

# Libraries typology – Prof. Kenneth Crews

- Preservation of Works.
- Replacement of Works.
- Copies for Study & Research.
- Making Available on Terminals.
- Lending of Physical Works.
- Lending of Digital Works.
- General Library Exception.
- Additional Conditions to Specific Exceptions.

**TOPIC:****Preservation of Works**

**Definition:** Copyright exception authorizing libraries to make reproductions and other uses of copyrighted works for the primary purpose of preserving the works.

Category of Library Activity	Owner's Rights Implicated	Elements of Statutory Exceptions	Elements for Ongoing Consideration
<p><i>Statutory Provision:</i></p> <p>Preservation of Works.</p> <p><i>Library Functions:</i></p> <ul style="list-style-type: none"> <li>• Copies to prevent loss.</li> <li>• Copies in response to loss or damage.</li> <li>• Copies for deposit in other libraries for security or safekeeping.</li> </ul>	<p><i>Primary:</i></p> <p>Reproduction.</p> <p><i>Secondary:</i></p> <p>Distribution (if the copies may be loaned by the library). Circumvention (if the original is secured by TPM).</p>	<p><i>Scope of Works:</i></p> <ul style="list-style-type: none"> <li>• Published or unpublished works.</li> <li>• Printed works.</li> <li>• Music &amp; sound recordings.</li> <li>• Audiovisual works.</li> <li>• Works protected by neighboring rights.</li> </ul> <p><i>Condition of the Works:</i></p> <ul style="list-style-type: none"> <li>• At risk of loss.</li> <li>• Damaged, deteriorating, lost, stolen.</li> <li>• Fragile.</li> <li>• Rendered unusable.</li> <li>• Obsolete format or technology.</li> <li>• Rare works.</li> <li>• Culturally important works.</li> <li>• Replacement not available on the market (if copying entire work).</li> <li>• Work must be in the collections of the library.</li> </ul> <p><i>Purpose of Use:</i></p> <ul style="list-style-type: none"> <li>• Preservation.</li> <li>• Add to collections.</li> <li>• Add to collections of another library or archive.</li> </ul>	<ul style="list-style-type: none"> <li>• Application of digital technology.</li> <li>• Implications of license or agreement for acquisition of the work.</li> <li>• Implications of extended collective licensing.</li> <li>• Number of copies allowed to be made.</li> <li>• Permitted uses of the copies by the library or by users.</li> <li>• Simultaneous availability of the original and the copy.</li> <li>• Authority for cross-border transfers.</li> <li>• Making copies of works before lending or exporting originals.</li> <li>• Extent of proof or documentation of compliance with statute.]</li> </ul>

# SCCR side event 1 – Truths, trends and tropes: unpacking the debate around copyright exceptions and limitations

- Organised by IFLA, Education International and EIFL
- Aimed to dispel some myths and misunderstandings
- Key messages
  - Licences cannot solve it all
  - Exceptions and limitations do not mean the end of markets
  - There is a need for global normative work on exceptions and limitations

# SCCR side event 2 – Archives and copyright: access to out documentary heritage

- Organised by the International Council on Archives
- Key messages:
  - What makes archives special
  - Challenge of orphan works
  - Extended collective licensing and archives (and why not everything can be licensed)



# Regional seminars

- 3 seminars in different world regions on the topic of exceptions and limitations within the context of libraries, archives, museums, education and research
- Bringing together representatives of copyright offices from all countries in each region, as well as WIPO officials and non-governmental organisations such as IFLA
- Results of the discussions will go into a report which will feed into a global conference on exceptions and limitations in October in Geneva (the week before the next SCCR)
- The report and findings of the conference will advise SCCR on potential next steps

# Seminar 1 – Asia-Pacific region (Singapore 29-30 April)

- 55 countries represented
- Broad consensus that international action was necessary
- Delegates discussed the matters in 4 working groups.
- Three of the four groups recommended that an international legal instrument be part of the package of work to be undertaken by WIPO
- The fourth, while not mentioning international work, nonetheless welcomed greater support to national policy making

# Seminar 2 – African region (Nairobi, 12-13 June)

- 55 member states represented
- Delegates discussed the matters in 3 working groups.
- An international instrument was the preferred solution for a number of library and education participants, but the majority of member states dismissed this in favour of licensing or national interventions rather than international solutions
- No clear consensus on the way forward
- One blog accuses WIPO of favouring rights holders:  
<http://infojustice.org/archives/41270>

# Seminar 3 – Latin America and the Caribbean region region (Santo Domingo, 4-5 July)

- No reports yet published

Directive (EU) 2019/790 on copyright  
and related rights in the Digital Single  
Market and amending Directives  
96/9/EC and 2001/29/EC



# The story so far

- September 2016 - The European Commission presented a legislative package for the modernisation of the EU copyright rules, including a new directive on copyright in the digital single market.
- General objective is to adapt EU copyright rules to the digital environment.
- 2016-2019 debate, redrafting and voting through all the EU mechanisms
- 26 March 2019 final vote. In favour – 348. Against – 274. Abstentions – 36.
- 15 April – approved by European Council. Member States have until 7 June 2021 to transpose into national law. Full text [here](#)

# Overview

- Amends Directives 96/9/EC (on the legal protection of databases) and 2001/29/EC (on the harmonisation of certain aspects of copyright and related rights in the information society)
- 32 articles, preceded by an 86-point Recital setting out the reasons for the provisions
- Article numbering has changed in this final version
- There has overall been improvement since the earlier drafts (e.g. removal of “exception stacking” prohibition)

# Structure

TITLE	CHAPTER	ARTICLES	RECITALS <i>indicative</i>
I. GENERAL PROVISIONS	-	1, 2	1–4
II. MEASURES TO ADAPT (E&Ls) TO THE DIGITAL AND CROSS-BORDER ENVIRONMENT	-	3 to 7	5–29
III. MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT	<i>1. Out-of-commerce works and other subject matter</i>	8 to 11	30–43
	<i>2. Measures to facilitate collective licensing</i>	12	44–50
	<i>3. Access to and availability of audiovisual works on video-on-demand platforms</i>	13	51–52
	<i>4. Works of visual art in the public domain</i>	14	53
IV. MEASURES TO ACHIEVE A WELL- FUNCTIONING MARKETPLACE FOR COPYRIGHT	<i>1. Rights in publications</i>	15, 16	54–60
	<i>2. Certain uses of protected content by online services</i>	17	61–71
	<i>3. Fair remuneration in exploitation contracts of authors and performers</i>	18 to 23	72– 81
V. FINAL PROVISIONS	-	24 to 32	82–86

# Article 1

- Defines the subject matter and scope of the Directive
- Aim: to harmonise further EU law, taking into account, in particular, digital and cross-border uses of protected content.
- Also lays down rules:
  - on exceptions and limitations to copyright and related rights
  - on the facilitation of licences which aim to ensure a well-functioning marketplace for the exploitation of works and other subject matter
- Clarifies that it doesn't amend existing rules laid out in previous copyright Directives unless specified in the text

# Article 2

- Provides definitions of key terms, e.g.
  - Research organisation
  - Text and data mining
  - Cultural heritage institution
  - Press publication
  - Information society service
  - Online content-sharing service provider



# Article 3 – Text and data mining for the purposes of scientific research

- Involves the reproduction of data in order to undertake computational analysis
- Currently there is an optional exception in EU Law which could permit text and data mining, but this now makes it a mandatory exception for the purposes of scientific research
- Applies to research organisations and cultural heritage institutions and works to which they have lawful access

# Article 3 – Text and data mining for the purposes of scientific research – cont.

- Protected from contractual override BUT rightholders will still be allowed to apply technical protection measures “to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted”
- However “such measures should remain proportionate to the risks involved, and should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception”
- “Member States shall encourage rightholders, research organisations and cultural heritage institutions to define commonly agreed best practices concerning the application of the obligation and of the measures referred to”

# Article 4 – Exception or limitation for text and data mining

- A mandatory exception for text and data mining NOT limited to scientific research by research organisations and cultural heritage institutions
- Must still have lawful access to the work and the rightholder must not have specifically objected to it (i.e. this exception CAN be overridden by contract)

# Article 5 – Use of works in digital and cross-border teaching activities

- A mandatory exception to allow the digital use of works for the sole purpose of illustration for teaching for non-commercial purposes by educational establishments on the premises or via a secure electronic environment
- BUT Member States **may** stipulate that this doesn't apply to specific uses or types of work such as material that is intended primarily for the educational market **or sheet music**, to the extent that suitable licences authorising the acts are easily available on the market.”
- Member states have the option to provide for fair compensation for rightholders
- Member states are free to specify, for the different types of work the proportion of a work that can be used

# Article 5 – Use of works in digital and cross-border teaching activities

- Best case scenario – a non-remunerated exception is adopted with no contractual override, facilitating the use of reasonable proportions of all kinds of works for any type of illustration for teaching purposes
- Worst-case scenario – the country chooses to apply a licence-model to most uses, licensing conditions are inadequate, the exception for any remaining uses is remunerated and there are differing rules for digital and non-digital uses



# Article 6 – Preservation of cultural heritage

- A mandatory exception allowing cultural heritage institutions to make copies of any works that are permanently held in their collections, in any format or medium, for preservation purposes
- Includes the use of digital preservation networks both within a member state and cross-border

# Article 7 – Common provisions

- Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable
- They are however subject to two provisions in the 2001 Information Society Directive – the three-step test in article 5(5) and the complex provisions in article 6(4) which allow for setting aside exceptions through the application of technological protection measures.

# Article 8 – Use of out-of-commerce works and other subject matter by cultural heritage institutions

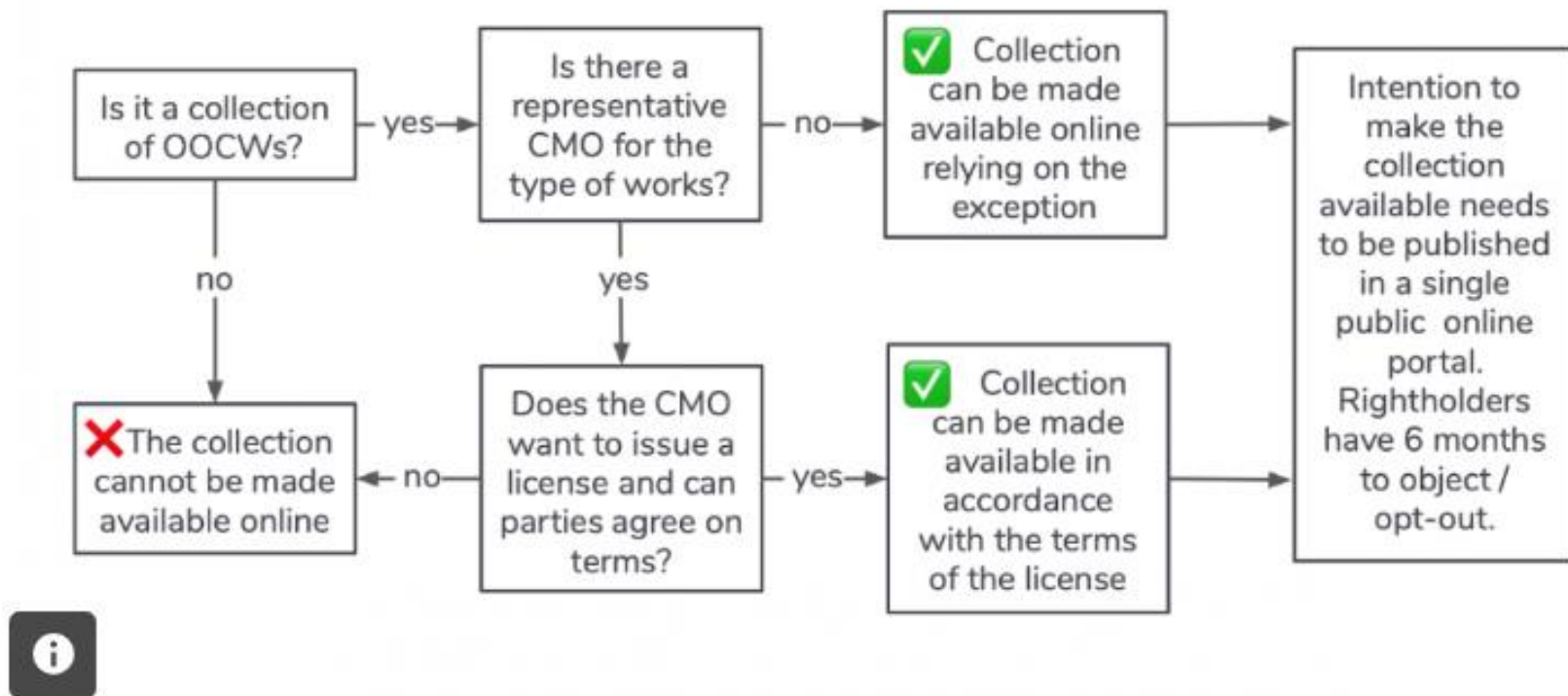
- Out-of-commerce defined: “when it can be presumed in good faith that the whole work is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public”
- Aim is to facilitate mass digitisation projects
- Sets out rules for when a collective management organisation can licence out-of-commerce works
- Provides an exception allowing cultural heritage institutions to make available out-of-commerce works that are part of their permanent collection on a website for non-commercial purposes where there is no collective management organisation who can licence that activity.
- However – rights holder may opt out of both the licence provision and the exception. And CMOs don't **have** to offer licences.

# Article 9 – Cross-border uses

- Licences granted in accordance with Article 8 must allow the use of out-of-commerce works by cultural heritage institutions in any Member State
- However if the the use in question is made under the exception, it is deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established

# Article 10 – Publicity measures

- The EU Intellectual Property Office will establish and manage a portal on which information on the parties to the licence/exception, the territories and uses covered must be posted from at least six months before the works are communicated to the public



*An overview of the process for making Out of Commerce Works available under the new provisions.*

Source: <https://pro.europeana.eu/post/explainer-what-will-the-new-eu-copyright-rules-change-for-europe-s-cultural-heritage-institutions?fbclid=IwAR1biSuSF0pKzlPYycKZvWyFHTB2NmIb4Q2V3f8FFcRmuGyIJOKxW3ZCzWk>

# Article 11 – Stakeholder dialogue

- Member States shall consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements for the determination of Out of Commerce status or works
- Member States shall encourage regular dialogue between representative users. and rightholders' organisations, including collective management organisations, and any other relevant stakeholder organisations on a sector-specific basis

# Article 12 – Collective licensing with an extended effect

- Permits (but doesn't **require**) collective management organisations to enter into a licensing agreement for the exploitation of works where the rightsholders have not authorised the CMO to represent them where the CMO is sufficiently representative of rightsholders in the relevant type of work
- Applies in “well defined areas of use where obtaining authorisations from rights holders on an individual basis is typically onerous and impractical”.
- Rightsholders may opt out of the licensing mechanism
- Will only have effect in the territory of the Member State concerned
- Doesn't affect the application of pre-existing ECL mechanisms



# Article 13 – Access to and availability of audiovisual works on video-on-demand platforms

- Member States shall ensure that parties facing difficulties related to the licensing of rights in order to make available AV works on video-on-demand services may rely on the assistance of an impartial body or mediators.
- The impartial body shall provide assistance to the parties with their negotiations and help them reach agreements

# Article 14 – Works of visual art in the public domain

- When the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation

# Article 15 – Protection of press publications concerning online uses

- New related right for press publishers – labelled by critics as the “link tax”
- Applies when an information society provider (e.g. online news aggregators, news agencies etc.) reproduces, and makes available online, material from a press publication
- Lasts for 2 years after publication. During this time press publishers could charge fees to link to their content
- Press publication = journalistic publications e.g. newspapers, magazines, news websites. Doesn't include academic journals, more general websites and blogs
- Doesn't apply to
  - private or non-commercial uses of press publications by individual users
  - The act of hyperlinking
  - The use of individual words

# Article 16 – Claims to fair compensation

- Introduces a claim for fair compensation for publishers (not just press publishers)
- Explicitly allows Member States to recognize for publishers a claim to a share of fair compensation due to authors in the context of a copyright exception
- Triggered where authors have transferred or licensed to publishers a right to a work, the use of which gives rise to such fair compensation

# Article 17 – Use of content by online content-sharing service providers

- Part of a broader policy push in the EU toward increasing the liability and responsibility of online platforms
- Regulates “online content-sharing service providers” [OCSPs]
- Defined as “a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works uploaded by its users, which it organises and promotes for profit-making purposes”

# Article 17 – Use of content by online content-sharing service providers

- Providers of services such as open source software development and sharing platforms, not-for-profit scientific or educational repositories as well as not-for-profit online encyclopedias are **excluded** from the definition
- If no authorisation is granted by rights holders, OCSPs shall be liable for unauthorised acts of communication to the public
- Where no authorisation has been granted to service providers, they should make their best efforts in accordance with high industry standards of professional diligence to avoid the availability on their service of unauthorised works.

# Article 17 – Use of content by online content-sharing service providers

- The steps taken by OCSPs in cooperation with rightsholders should not lead to the prevention of availability of non-infringing content, including works the use of which is covered by a licensing agreement or an exception or limitation to copyright. Steps taken by such service providers should, therefore, not affect users who are using the online content-sharing services in order to lawfully upload and access information on such services.

# Article 17 – Use of content by online content-sharing service providers

- If unauthorised content is on their site, an OSCP can avoid liability by demonstrating they have met a number of conditions
  - Made best efforts to obtain an authorisation
  - Made best efforts to ensure the unavailability of specific works for which the right holders have provided them with the relevant and necessary information
  - Acted expeditiously subsequent to notice from right holders, to take down infringing content and make best efforts to prevent its future upload
- To meet these conditions, in practice, it seems inevitable they will use automated content recognition technologies that examine all uploaded content



# Article 17 – Use of content by online content-sharing service providers

- Compulsory complaint and redress mechanisms for users to dispute the removal of works
- The Commission is tasked with organising stakeholder dialogues to ensure uniform application of the obligation of cooperation between OCSPs and rights holders and to establish best practices with regard to the appropriate industry standards of professional diligence.

# Article 18 – Principle of appropriate and proportionate remuneration

- Where authors and performers license or transfer their exclusive rights for the exploitation of their works, they are entitled to receive appropriate and proportionate remuneration
- Lump sum payment may be considered proportionate remuneration “but it should not be the rule”.

# Article 19 – Transparency obligation

- Authors and performers must receive on a regular basis (at least once a year) up to date, comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights.
- Includes information on modes of exploitation, revenues generated and remuneration due
- Subject to certain conditions additional information may be requested from sub-licensees

# Article 20 – Contract adjustment mechanism

- Authors and performers are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, when the remuneration agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances by the contractual counterpart
- Doesn't apply to agreements concluded by CMOs or "independent management entities" which are subject to national rules implementing the 2014 Collective Rights Management Directive

# Article 21 – Alternative dispute resolution procedure

- Disputes concerning articles 19 and 20 may be submitted to a voluntary dispute resolution procedure, which may be initiated by a CMO at the specific request of one or more authors or performers it represents

# Article 22 – Right of revocation

- Authors and performers by revoke in whole or part an exclusive licence or transfer of rights on the grounds of lack of exploitation of their work
- Can only be exercised within “a reasonable period” after the conclusion of the contract
- Creator may opt for termination or exclusivity instead of revocation

# Article 23 – Common provisions

- Articles 90, 20 and 21 cannot be overridden by contract, but contractual derogation from the right of revocation is possible.

# Article 24 – Amendments to Directives 96/9/EC and 2001/29/EC

- Amendments to the Database and InfoSoc Directives to safeguard the application of the new mandatory exceptions in the DSM Directive



# Article 25 – Relationship with exceptions and limitations provided for in other directives

- Member States may adopt or maintain in force broader provisions, compatible with the exceptions and limitations provided for in Directives 96/9/EC and 2001/29/EC, for uses or fields covered by the exceptions or limitations provided for in this Directive

# Article 26 – Application in time

- Will apply in respect to all works that are protected on or after 7 June 2021, but without prejudice to acts concluded or rights acquired before that date

# Article 27 – Transitional provision

- Exploitation agreements with creators are only subject to the transparency agreement in article 19 as from 7 June 2022

# Article 28 – Protection of personal data

- The processing of personal data carried out under the provisions of this Directive must comply with the rules in the ePrivacy Directive and the GDPR

# Article 29 - Transposition

- Member States must transpose the Directive into national law by 7 June 2021 and immediately inform the Commission

# Article 30 - Review

- The Commission shall carry out a review of the Directive no sooner than 7 June 2026

# Next steps

- National transposition required by 7 June 2021
- Requirement to consult
- IFLA guidance by end of this summer
- Join this list for updates <http://infoserv.inist.fr/wwwsympa.fcgi/info/eu-dsm>

# What you can do

- Find out which government department will be implementing the Directive, and when and how they will start consultation on the implementation
- Talk to the appropriate civil servants implementing the Directive, whether directly yourselves or through an appropriate body such as a library association, educational body etc
- Attend consultation meetings
- Make written submissions to government about how the law should be implemented (whether as an individual, as an institution or through your national branch)
- Engage with Members of your Parliament who are interested in education and cultural heritage
- Engage with rightsholders and collective management organisations in areas where cooperation will result in practical arrangements that work on both sides



# Where have consultations already begun?

- Netherlands (deadline 2 September)
- Finland?